NO. 77724-1

SUPREME COURT OF THE STATE OF WASHINGTON

VOTERS EDUCATION COMMITTEE, *et al.*,

Plaintiffs/Appellants,

v.

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, *et al.*,

Defendants/Respondents,

and

DEBORAH SENN,

Intervenor.

RESPONSE OF PUBLIC DISCLOSURE COMMISSION TO SUPPLEMENTAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

A. *WRTL II* Is Irrelevant To The Issue Of Whether The Statutory Definition Of "Political Committee" Is Unconstitutionally Vague.

The Voters Education Committee (VEC) states that *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2007 WL 1804336 (2007) (*WRTL II*), supports its argument that the definition of "political committee" in RCW 42.17.020(38) is vague. VEC Supp. Br. at 3. To the contrary, the question of whether any provision of the Bipartisan Campaign Reform Act of 2002 was vague was not an issue in *WRTL II*.

The VEC's assertion that *WRTL II* confirms that regulations of political speech must be "clear and objective," VEC Supp. Br. at 2, has no bearing on this Court's vagueness analysis here. While *WRTL II* held that subjective factors such as "intent and effect" are irrelevant in determining whether an ad is the functional equivalent of express advocacy, it went on to say that objective factors, such as the content of the ad, are relevant in the analysis. *WRTL II*, 127 S. Ct. at 2666-68. This clarification is consistent with the PDC's previous briefing to this Court.

B. *WRTL II* Confirms That The VEC Ads Constituted Express Advocacy.

In the context of a federal statutory restriction on speech, *WRTL II* clarified the test for determining whether an ad is express or issue advocacy: "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal

to vote for or against a specific candidate." *WRTL II,* 127 S. Ct. at 2667.[1] The VEC's ads meet that test as the functional equivalent of express advocacy.

The VEC tries to distinguish its ads from the WRTL ads by comparing the "characteristics" of the two. VEC Supp. Br. at 5-6. However, it only selectively discusses the characteristics listed in *WRTL II.* A comparison of all the listed characteristics of the WRTL ads (quoted in italics below, *WRTL II,* 127 S. Ct. at 2667) with those of the VEC reveals that the VEC ads were plainly not the functional equivalent of express advocacy:

"First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, . . ." The VEC ads are inconsistent with a genuine issue ad because they did not focus on any legislative issue or any pending public policy issue. Candidate Senn was the only individual mentioned in the ads. At the time of the ads, Senn held no public office and was in no position to affect public policy.

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[1] VEC argues for the first time that this Court cannot "retroactively construe" RCW 42.17.020(38) to reach any speech that is not "explicit words of advocacy" (formerly described as "magic words"). VEC Supp. Br. at 10; *see also* VEC Br. at 5, 16, 30. However, *WRTL II*'s clarification of what is or is not the functional equivalent of express advocacy did not change prior precedent establishing that the functional equivalent of express advocacy could be regulated. *McConnell v. Federal Election Commission,* 540 U.S. 93, 206, 124 S. Ct. 619, 157 L.Ed.2d 222 (2003). *See also WRTL II,* 127 S. Ct. at 2674 ("*McConnell* held that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of express advocacy. We have no occasion to revisit that determination today.")

"[T]ake a position on the issue . . ." VEC has failed at any point in these proceedings to clearly identify any public policy issue on which it was taking a position.

"[E]xhort the public to adopt that position . . ." The ads did not exhort the public to adopt any position on any public policy issue – other than an exhortation to vote against Senn as the PDC previously argued.

"[A]nd urge the public to contact public officials with respect to the matter." The ads did not urge any contact with public officials, nor did they identify any public officials. Rather, they simply levied criticism on the candidate and pointed to a website "to learn more." CP 51.

"Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; . . ." The VEC ads do not contain indicia of express advocacy. The only individual mentioned – indeed the entire focus – in the ad was a non-incumbent candidate for state-wide political office in an upcoming election.

"[A]nd they do not take a position on a candidate's character, qualifications, or fitness for office." The VEC ads focused on the candidate's character, qualifications and fitness for office.

Attempting to show a reasonable interpretation of its ads other than an appeal to vote against a specific candidate, the VEC asserts that its ads

"described truthfully . . . the official conduct of a candidate, which had subsequently been the subject of legislative action, and urged the public to consider a serious issue raised by that conduct, namely, the ethics obligations and legislative oversight of government officials." VEC Supp. Br. at 5-6. However, even by the VEC's description, the ads do not focus on an issue; they describe and urge the public to consider – presumably when voting – the candidate's past conduct. There simply is no plausible interpretation of the VEC ads other than an appeal to vote against a specific candidate.

Despite the VEC's suggestion to the contrary (VEC Supp. Br. at 7), the PDC, like the *WRTL II* Court, did not rely on a character attack test. Rather, the PDC argues, consistent with *WRTL II*, that an ad taking a position on a candidate's character, qualifications, or fitness for office, shows "indicia of express advocacy." *WRTL II*, 127 S. Ct. at 2667. The VEC also reiterates that the ads considered in *Washington State Republican Party v. Public Disclosure Commission*, 141 Wn.2d 245, 4 P.3d 808 (2000) (*WSRP*), were susceptible to a reasonable interpretation other than an appeal to vote against a candidate. VEC Supp Br. at 7-8. However, that factually-driven analysis does not assist here because the *WSRP* issue ad focused on policy issues such as crime control and prostitution and was directed at an incumbent public official. In contrast,

as discussed above, the VEC ads focused on nothing other than the character of a non-incumbent candidate. Although, "[i]ncidental commentary of the candidate's character cannot turn the ad into the functional equivalent of express advocacy" (VEC Supp. Br. at 8), there was nothing incidental about the VEC's focus on the character of Senn.

In conclusion, as the PDC has previously argued, the definition of "political committee" in RCW 42.17.020(38) is not unconstitutionally vague. If this Court determines that definition is vague, it should construe it narrowly only to apply to express advocacy or its "functional equivalent", by applying the *WRTL II* test and determining that the VEC ads are "susceptible of no reasonable interpretation other than as an appeal to vote . . . against" Senn.

RESPECTFULLY SUBMITTED this 20th day of July, 2007.

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